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Substitute the word " unobtainable " for the word " obtainable ".

VERSLAE

VAN DIE

NATURELLE-APPÈLHOWE

1955 (3)

REPORTS

OF THE

NATIVE APPEAL COURTS

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NORTH-EASTERN NATIVE APPEAL COURT.

MAKATINI *v.* MAKATINI.

N.A.C. CASE No. 21 OF 1955.

PIETERMARITZBURG: 13th July, 1955. Before Steenkamp, President, Ashton and Bayer, Members of the Court.

PRACTICE AND PROCEDURE.

APPEALS.

Unstamped appeal—Validated after time limit for appeal—Condonation.

Summary: A document purporting to be an appeal from a judgment of a Court of a Native Commissioner was not stamped and when stamped the time for noting an appeal had elapsed. As no application for condonation for the late noting was made in terms of the rules it was struck off the roll. Then it was re-instated on the roll and application for condonation was heard.

Held: There is no excuse for an unstamped Notice of Appeal being lodged with a Clerk of the Court.

Held further: That a Clerk of Court may refuse to accept an unstamped document purporting to be a Notice of Appeal—Section 21 (4) of the Stamp Duties and Fees Act.

Held further: That although failure to stamp the document resulted in the appeal being noted late the Appeal Court must still take into consideration the question of possibility of success of appeal if late noting condoned.

Held further: That in the circumstances of this case the application must be refused.

Statutes, etc., referred to:
Section 21 (4) of the Stamp Duties and Fees Act, 1911 (Act No. 30 of 1911).

Appeal from the Court of the Native Commissioner, Howick.

Steenkamp (President): Delivering the judgment of the Court:—

The appeal was struck off the roll at the January, 1955, session of this Court as it had not been properly noted.

Application is now made for the reinstatement of the appeal on the roll. At the same time application is made for the condonation of the late noting of the appeal.

From the supporting affidavit by Applicant's attorney it would appear that the notice of appeal had not been properly stamped and for this reason it had been struck off the roll.

The notice of appeal has now been properly stamped and this Court is called upon to condone the late noting.

There is no excuse for an unstamped notice of appeal being lodged with the Clerk of the Court who could in the first instance have refused to accept it *vide* Section 21 (4) of the Stamp Duteis and Fees Act. He, however, did not do so and this Court struck the case off the roll.

The Applicant cannot, on the ground that the stamps were inadvertently omitted, seek the indulgence of this Court but there is also the question as to whether the Applicant has a reasonable prospect of success on appeal.

The applicant bases his claim for damages on the allegation that Respondent had made a false statement to the head of the family that applicant had been smelt out by an *Isangoma* as having caused the illness of another member of the family. Applicant and respondent are half-brothers. Their uncle is the head of the family, and the person who had become mentally deranged was a brother of the applicant and respondent.

Applicant had agreed or suggested that an *Isangoma* should be consulted to find out who had caused the illness of the brother. It was only natural that the verdict of the *Isangoma* should be conveyed to the head of the family. This was done in the presence of the applicant who raised no objection when it was mentioned by Respondent that the *Isangoma* had smelt him out.

Applicant, however, testifies that he was not the one picked on. If his evidence is believed then he has a good case for damages but the Native Commissioner has found that he was actually pointed out. He was a party to the agreement to consult an *Isangoma* and therefore as correctly pointed out by the Native Commissioner the maxim *volenti non fit injuria* is applicable in the case.

In the circumstances applicant has no prospect of success and therefore the application for the condonation of the late noting of the appeal is refused with costs.

For Appellant: Adv. D. L. L. Shearer (instructed by J. R. N. Swain).

For Respondent: Mr. N. Goosen (of C. C. C. Raulstone & Co.).

NORTH-EASTERN NATIVE APPEAL COURT.

MAZIBUKO *v.* **KUMALO.**

N.A.C. CASE No. 23/55.

PIETERMARITZBURG: 14th July, 1955: Before Steenkamp, President. Ashton and Bayer, Members of the Court.

PRACTICE AND PROCEDURE.

EXECUTION OF A CHIEF'S JUDGMENT.

Attachment in pursuance of a Chief's judgment: Sale by Chief's Messenger: Balance of proceeds from sale after judgment met.

Summary: Pursuant to a judgment of the Chief who was defendant in the case plaintiff's ox was attached, placed with an Indian and then sold for £7. 10s. Plaintiff claimed the return of his ox or its value £20 declaring the sale was wrongful and unlawful, or such amount as might be found to be due, a portion of the judgment debt having been liquidated.

Held: That the attachment of the ox was not unlawful but its actual sale was not on the evidence according to custom.

Held further: That nevertheless plaintiff was not prejudiced by the manner of the sale; and

Held further: That plaintiff was entitled to recover the amount by which the price obtained for his ox exceeded the judgment debt.

Statutes, etc., referred to:
Section *eight* (1) of Chiefs' and Headmens' Civil Courts: Regulations. (Government Notice No. 2885 of 9th November, 1951.)

Appeal from the Court of the Native Commissioner, Ladysmith.

Ashton (Permanent Member): Delivering the judgment of the Court.

Plaintiff sued the defendant in the Court of the Native Commissioner at Ladysmith for the return of one ox or its value £20, and the words "or such an amount as may be found to be due" were added to the claim. He declared that the claim arose out of the wrongful and unlawful attachment of the ox by the defendant who was his Chief. The defendant pleaded that plaintiff had failed to satisfy a judgment given against him by him in favour of one Johannes Mkwanazi and accordingly he had attached the ox and sold it and plaintiff had failed to come to him to get the balance of the proceeds. The presiding officer in the Native Commissioner's Court gave judgment for defendant with costs and an appeal has been lodged with this Court on the following grounds:—

"1. The findings of the Court was against the weight of evidence.

2. In particular, there was insufficient evidence to establish Respondent's right to have attached appellant's beast."

To deal with the second ground of appeal first it would seem from the plea of defendant that the case in which he as Chief gave judgment was against present plaintiff and his wife but the record of the case shows it to have been against his wife and himself, he being cited in his capacity as her husband. The case is generally referred to as against the wife who took the plough of Johannes Mkwanazi. The latter, it would seem, was awarded £4 damages. It would seem too that the case went on appeal and the appeal was dismissed. This being the case it must be accepted that if the judgment had not been fulfilled execution was a lawful consequence.

Although the evidence of the wife is not very satisfactory it is recorded that she paid £3. 10s. to the Chief and got a receipt for £3. 7s. 6d. She said that the Chief made no mention of costs to her and told her it was a final settlement but the receipt shows the money to have been paid on account.

The tribal constable on page 6 said the Chief gave judgment for £3. 10s. and made no mention of costs.

The defendant says he sent to the wife to collect the "balance" which according to the statement of account Exhibit "B" was £1. 3s. and suggests it would have been undignified for him to take it to her—but there was nothing to stop him from paying it into Court and it is not understood why the Assistant Native Commissioner should not have given judgment for that balance on the summons. With that balance owing he should have given judgment for plaintiff on the alternative claim and this might fall under ground No. 1 of the appeal. It might be undignified for a Chief to go to a member of his tribe and pay a balance owing but it is far more undignified for him to retain the money of that person which he is not entitled to. Defendant does not deny having been asked not to proceed with the sale as the plaintiff was away in Durban and does not give a satisfactory explanation.

The Assistant Native Commissioner found that the ox was not unlawfully attached and this Court agrees with that finding. The manner of selling the beast is, however, not so easy to justify. Section 8 (1) of the Chiefs' Courts' Rules provides that the procedure in connection with the execution of a Chief's judgment shall be in accordance with the recognised customs and laws of the tribe over which the Chief has been appointed. The only evidence given on the subject of the customs and laws of the tribe in this case was to the effect that the animal is attached by the Messenger of the Chief and is left in the possession of the owner until the day of the sale when the Messenger takes it and sells it. It was said that the sale is not a public one and that any person may come on the day of the sale and make an offer and the Chief may sell the beast "at the price he likes." The Defendant himself says that he sent his Messenger to seize the beast and bring it to his kraal and that he took it to an Indian store where it ran for some days and eventually it was sold to an Indian at the store for £7. 10s.

Although the actual sale of the beast was, on the evidence not according to custom there is nothing to show that the plaintiff suffered thereby, for although he claimed that the beast was worth £20 there is sufficient evidence to conclude that £7. 10s. was its fair value at the time of the sale.

The only conclusion this Court can come to in the circumstances disclosed is that the Plaintiff should have succeeded to the extent to which the price obtained for his ox exceeded the judgment debt. That was shown to be £1 .3s. and the judgment of the Assistant Native Commissioner should have been for that amount and costs.

It is ordered that the appeal be and it is hereby allowed with costs, the judgment in the Court below is set aside and for it is substituted "Judgment for Plaintiff for £1. 3s. and costs."

For Appellant: Mr. J. B. Tod of J. B. Tod & Co.

For Respondent: In person.

NORTH-EASTERN NATIVE APPEAL COURT.

MCHUNU *v.* MCHUNU.

N.A.C. CASE No. 25/55.

PIETERMARITZBURG: 14th July, 1955. Before Steenkamp, President, Ashton and Bayer, Members of the Court.

PROCEDURE: DEFAULT JUDGMENT.

Summary: In a Chief's Court plaintiff sued defendant for *lobolo* in respect of his sister, defendant resisted the claim and sought to set off cattle due by plaintiff to him; the hearing was adjourned and on the day set down for resumption defendant was in default and the Chief gave judgment against him; the Chief refused an application by defendant to rescind the default judgment; on appeal the question arose as to whether the Court was to deal with the case on its merits or as an appeal against the Chief's refusal to rescind the default judgment; the Additional Native Commissioner held that it made no difference as in any event the case must be heard *de novo*.

Held: That the proviso to Chief's Court Rule No. 2 (1) Government Notice No. 2885 of 1951, must be strictly observed by Chiefs.

Held further: That if the appeal had been against a refusal by the Chief to rescind the default judgment there was no need for the merits of the main issue to be considered—The presiding officer should have confined himself to the issue on appeal.

Held further: That if the appeal had been against the merits of the case the notice of appeal was out of time and condonation should have been granted before hearing evidence.

Held further: That the correct procedure for the defendant to have followed was, in terms of section *two* (3) of the Chief's Courts' Rules, to have asked the Chief to rescind his default judgment and if his application were refused, to have appealed against that refusal to the Native Commissioner's Court.

Statutes, etc., referred to:

Section 2 (1), 2 (3), 6, 7 and 12 (4) of Chief's and Headmens' Civil Courts Regulations (Government Notice No. 2885 of 9th November, 1951).

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

Steenkamp (President), delivering the judgment of the Court:—

This case, which comes to this Court from that of the Native Commissioner, Pietermaritzburg, to which it went on appeal from the Court of Bekizizwe Zondi, bristles with mistakes and irregularities—this despite the fact that in the Native Commissioner's Court both parties were legally represented.

In the Chief's Court the plaintiff sued the defendant for two head of cattle being *lobolo* due in respect of his sister. Defendant appeared in the Chief's Court on the first day of the hearing and his reply to the claim was that he would not pay the two head of *lobolo* cattle because the two head of cattle replace those due in respect of the *lobolo* of his mother." The case was postponed and heard at a later date and eventually judgment was given for plaintiff by default.

The defendant was unaware of this judgment until about six months later when a beast of his was attached by the Chief's Messenger. According to an affidavit filed by the defendant he approached the Chief concerned and applied for a rescission of the default judgment which the Chief refused to allow. The affidavit also contains a clause which reads:—

> "I ask that it please the Court to condone the late noting of my appeal and allow me to appeal against the judgment of the Chief in this case."

In his reasons for judgment the Chief stated that he gave judgment in favour of plaintiff because defendant admitted plaintiff was the rightful owner of the cattle but he refused to give them up as he was taking them to replace cattle which were due to him as *lobolo* for his (plaintiff's) mother. The Chief also furnished his reasons for giving a default judgment saying that the case was postponed to a certain Saturday and that although informed, defendant was not present and so judgment was given against him by default. It is clear from the record that the postponed hearing which defendant did not attend was on Saturday the 19th June, 1954, and that on the same day the default judgment was pronounced.

The appeal was noted on the 16th March, 1955, and was obviously out of time if it was directed to an appeal on the merits of the case but not necessarily so if against the Chief's refusal to rescind his default judgment.

When the appeal came before the Additional Native Commissioner the attorney for plaintiff raised the question whether the appeal was against the refusal of the Chief to rescind the default judgment or whether it was to be regarded as an appeal against the Chief's original judgment. The Additional Native Commissioner held in effect that as in any case an appeal from a Chief's Court is heard *de novo* it did not matter because he held that the appeal was "therefore against judgment as such." The Additional Native Commissioner then ruled that defendant should commence though he gave no indication why and thereafter when defendant had closed his case and plaintiff had called evidence he allowed the appeal with costs and altered the Chief's judgment to read "For defendant with costs."

Chiefs' Civil Courts' Rule No. 12 (4) provides that on the day fixed for the appearance of the parties the Court of the Native Commissioner shall proceed to re-hear and re-try the case as if it were one of first instance in that Court and may give such judgment or order thereon as justice may require. If therefore the appeal was against the Chief's refusal to rescind the default judgment there was no need for the Additional Native Commissioner to have gone into the evidence of the main case. He should have confined himself to the issue brought on appeal. In his reasons for judgment he makes out a case for accepting that the appeal against the Chief's refusal to rescind was noted in time and on that basis he could have heard the appeal. But if he wished to hear the appeal against the original default judgment it was essential for him to have condoned the late noting of the appeal. He did not condone the late nating of the appeal—because he erroneously thought the noting was not late—and he was accordingly in error in hearing the appeal as he did.

At this point it is desirable to point out that the correct procedure for the defendant to have followed was in terms of section 2 (3) of the Chiefs' Courts' Rules to have asked the Chief's Court to rescind the default judgment entered against him and that Chief having refused his application, to have appealed against the refusal to the Native Commissioner's Court. This is such a well-established procedure that it is a matter for surprise that defendant was not so advised when he first sought assistance in the matter and that the matter was not so dealt with in the Native Commissioner's Court.

It may have been that had the Chief registered the judgment he gave when he refused to rescind the default judgment the matter would have been clearer when it came before the Native Commissioner's Court. It seems hardly necessary to state here that sections 6 and 7 of the Chief's Courts' Rules apply to all judgments pronounced by Chiefs but as registration did not apparently take place in this instance this Court lays it down that the rules mentioned must be complied with in respect of all judgments pronounced by Chiefs.

If the appeal had come properly before the Native Commissioner's Court it would (or should) have become apparent that the Chief's default judgment was irregularly granted as will be seen from a proper study of section 2 (1) of the Rules of Chiefs' Courts (Government Notice No. 2885, dated the 5th November, 1951). This rule, while allowing Chiefs to grant judgments against a defendant in default contains an important proviso which reads:—

> " . . . . provided that no default judgment shall be given within forty-eight hours after the time for the hearing of the action."

It is clear from the record that judgment was given on the same day as defendant's default occurred and the proviso to the rule was clearly disregarded. This Court of its own motion has decided that it must take notice of this irregularity which surprisingly is not mentioned in the voluminous grounds of appeal furnished by plaintiff which are no less than ten in number, by

setting aside the whole of the proceedings in the Chiefs' and the Native Commissioner's Court thus allowing the plaintiff to institute his action afresh in whichever of the two Courts he wishes. (It may here be mentioned Counsel for both parties conceded that the Chief's default judgment was invalid).

It is ordered accordingly and the circumstances being such as they are no order as to costs is made in this, the Native Commissioner's or the Chief's Court.

For Appellant: Adv. D. L. L. Shearer (instructed by J. R. N. Swain).

For Respondent: Adv. J. A. Howard (instructed by Leslie Simon & Co.).

NORTH-EASTERN NATIVE APPEAL COURT.

KUNENE *v.* MADONDA.

N.A.C. CASE No. 27/55.

PIETERMARITZBURG: 15th July, 1955. Before Steenkamp, President, Ashton and Bayer. Members of the Court.

PRACTICE AND PROCEDURE.

Amendment of wrongly recorded Chief's judgment.

Summary: A judgment of a Chief was recorded as for plaintiff for £10; when plaintiff executed on the judgment defendant resisted saying the judgment pronounced was for defendant with costs. The defendant, now applicant, sought to have the entry in the register deleted and for it substituted the judgment he claimed was pronounced.

Held: That the Native Commissioner was wrong in his decision that the only way in which a recorded Chief's judgment could be changed was by way of appeal.

Held further: That as there is no provision in the Rules for the correction of a Chief's judgment which has been wrongly recorded the following procedure must be adopted to have the register amended:—

(i) Application must be made to the Court of the Native Commissioner;

(ii) Applicant must cite the other party or parties to the judgment, the Chief who presided and delivered the judgment and such other officers of the Chief's Court whom circumstances indicate are necessary to be cited;

(iii) The Court after investigation decides what the true and correct judgment was and directs the Clerk of the Court to record this finding.

Cases referred to:
Mtongo *v.* Mkize, N.H.C. 1918, 134.
Komo *v.* Dhlomo, N.A.C. 1940 (T. & N.). 140.
Nqoko *v.* Nqoko, N.A.C. 1942 (T. & N.). 86.

Statutes, etc., referred to:
Rule No. 56, Native Commissioners' Courts' Rules. (Government Notice No. 2886 of 9th November, 1951).
Section 7 (2) of Chiefs' and Headmens' Civil Courts—Regulations. (Government Notice No. 2885 of 9th November, 1951).

Section 10 (1) and (2) of the Native Administration Act (No. 38 of 1927).

Appeal from the Court of the Native Commissioner, Richmond.

Ashton (Permanent Member): Delivering the judgment of the Court.

An application under Native Commissioners' Courts Rule No. 56 was made to the Court of the Native Commissioner, Richmond. addressed by Applicant who was the defendant in a Chief's Court action to respondent who was plaintiff in that action.

Applicant's application set out that the judgment pronounced by the Chief was "Judgment for defendant with costs" whereas it was recorded and registered by the Chief's Messenger as "for plaintiff for £10."

Thereafter the applicant prayed that the judgment as recorded be set aside and the correct judgment be registered.

When the application came before the Native Commissioner respondent's attorney excepted to it "on the grounds that the judgment as recorded was the proper judgment and that it was not competent at this stage to proceed by way of application, that the proper way to proceed was by way of appeal and that the case would have to be heard *de novo*."

The rules of Chiefs' Courts contain no provision for the correction of a judgment which has been wrongly recorded or registered as did the old rules which the present ones supercede and so far as can be ascertained there is no reported previous decision of this Court, since the new rules came into force which could be used as a precedent.

There was no evidence either on affidavit or verbally before the Court and the Native Commissioner must have had access to information not on the record to enable him to say as he did in his reasons for judgment that "the case was heard and judgment given in the Chief's Court in 1953. The judgment was properly recorded as laid down in the rules."

The Native Commissioner held "that the recorded judgment especially after the lapse of such a considerable period must be taken to be the judgment of the Court and that the only way in which this could be changed by the Native Commissioner's Court would be by way of appeal." In this he was partly mistaken because although he was right in the conclusion he came to that he could not hear the application as it came before him he was not right in saying the matter must come before him only on appeal.

Applicant appealed against the Native Commissioner's judgment which read:—

"Application dismissed with costs. (Exception upheld)" giving the following grounds:—

"1. That the applicant adopted the correct procedure in asking for relief by way of application.

2. That the Court was not justified in refusing to hear evidence in support of the application."

Appellant's counsel in this Court contended that although there was no specific provision in the rules for a Court of a Native Commissioner to amend or correct a written record of a Chief's judgment it was possible, on the analogy of the provisions contained in Chiefs' Courts Rule No. 7 (2), for a Native Commissioner's Court to do so on application made in terms of section 56 of the Native Commissioners' Courts' Rules.

Section 7 (2) of the Chiefs' Courts' Rules reads:—

"If after forty days the written record has not been delivered . . . . the judgment shall lapse: Provided that the Native Commissioner may on good cause shown authorise registration of the judgment."

But this Court cannot accept this contention unless it is qualified by a condition that all the interested parties are cited in the application made to the Court; we hold this not on the analogy pointed out by appellant's Counsel but rather on the powers conferred on Native Commissioner's Courts by section *ten*, sub-sections (1) and (2) of the Native Administration Act No. 38 of 1927.

To put the position precisely this Court holds that when it is alleged that a Chief's judgment has been incorrectly recorded the Court of the Native Commissioner having jurisdiction has the power to order the registering officer—his Clerk of the Court —to record what he finds after investigation to be the true and correct judgment and the Native Commissioner may only investigate the allegation on an application made to his Court by the applicant who must cite the other party or parties to the judgment, the Chief who presided and delivered the judgment and such other officers of the Chief's Court whom circumstances indicate are necessary to be cited.

This decision is fortified by the judgment of the Native High Court in Mtongo *v.* Mkize, N.H.C. 1918, 134 [which was followed in Komo *v.* Dhlomo, N.A.C. 1940 (T. & N.), 140 and Nqoko *v.* Nqoko, N.A.C. 1942 (T. & N.), 86] where it was held under the then rules (which allowed alteration by consent) that it was only the Magistrate who could investigate the matter and that the Magistrate did have jurisdiction.

In the circumstances the appeal must be dismissed with costs because the Native Commissioner's judgment was correct in so far as he dismissed the application though the dismissal was not correctly founded and his directive remarks were not correct.

It is ordered therefore that the appeal be and it is hereby dismissed with costs but the judgment of the Native Commissioner is altered to read "Application dismissed with costs."

For Appellant: Adv. D. L. L. Shearer (instructed by L. C. Miller).

For Respondent: Mr. N. Goosen of C. C. C. Raulstone & Co.

NORTH-EASTERN NATIVE APPEAL COURT.

SHANDU *v.* **MPUNGOSE.**

N.A.C. CASE No. 32/55.

ESHOWE: 19th July, 1955. Before Steenkamp, President, Ashton and Cowan, Members of the Court.

RULES OF COURT.

CONDONATION OF LATE NOTING OF APPEAL.

Where reasons for late noting of appeal do not of themselves justify condonation, consideration must be given to grounds of appeal and to prospects of its success if condonation were granted. Discussion of Rules of Court.

Summary: Appeal noted late; reasons for late noting not justification for condonation; consideration of grounds of appeal; non-compliance with rules of Court does not prejudice appellant and no prospects of appeal being successful.

Held: That irregularities in procedure which do not prejudice an appellant are not justification for the condonation of late noting of an appeal.

Held further: That where a cause is *lis pendens* the Court has a discretion to allow the case to proceed and provided such discretion is properly exercised no justification for condonation of late noting of appeal can arise.

Held further: That Rules for Courts of Native Commissioners were promulgated for the benefit of litigants as well as officers of the Court and Rule No. 52 (4) of Government Notice No. 2886 of 1951 must be strictly adhered to.

Held further: That if the Presiding Officer proposes to act under that rule he must record the circumstances and the consent of the parties if such is given.

Statutes, etc., referred to:
Rule 32 and Rule 52 (4) of Native Commissioner's Court Rules (Government Notice No. 2886 of 9th November, 1951).

Appeal from the Court of the Native Commissioner, Melmoth.

Steenkamp (President), delivering the judgment of the Court:—

This is an application for condonation of the late noting of an appeal against the judgment of a Native Commissioner's Court.

The reasons for the late noting of the appeal are such that this Court is not prepared to grant the application on them alone. Consideration has therefore in the ordinary course to be given to the grounds of appeal which would be relied on were the condonation granted. They are as follows:—

"1. That the hearing was premature in that it was not in compliance with Rule 32 of the Native Commissioner's Court Rules.

2. The Learned Native Commissioner erred in proceeding with the hearing of this case after it had been revealed, in evidence, that the matter was *lis pendens*, and should have referred the case back to the Chief's Court.

3. The proceedings were irregular in that the Learned Native Commissioner allowed evidence to be led before the stage *litis contestatio* had been reached as required under the Rules of Court.

4. The judgment was against the evidence and weight of evidence."

Grounds Nos. 1 and 3 were not seriously stressed by counsel for applicant. He did in fact concede that applicant has not suffered any prejudice by reason of the irregularities pointed out and in regard to ground No. 2 he conceded that the Native Commissioner had a discretion to allow the case to proceed but did not advance any substantial argument to show that the discretion was not reasonably exercised. This Court is of opinion that there was no substantial prejudice in respect of grounds Nos. 1 and 3 and is not prepared to quarrel with the discretion exercised by the Native Commissioner.

In regard to the fourth ground of appeal this Court is satisfied that on the evidence there is no reasonable prospect of success on appeal.

Accordingly the application for condonation is refused with costs.

But the Court is constrained to remark that the Rules for Native Commissioners' Courts were promulgated for the benefit of the litigants as well as the officers of those Courts and Rule 52 (4) of Government Notice No. 2886 of the 9th November, 1951, must be strictly adhered to.

This rule allows the Court to hear a case where the parties on the day set down for appearance to be entered, appear legally unrepresented, have their witnesses ready at Court and consent to the case going on. If the circumstance are such that the presiding officer proposes to act under this rule be should record what the circumstances are, that he has explained the position to the parties and asked them whether they consent to the case proceeding before he goes further with it. If the parties do consent he should record that they do and if they do not the defendant should be referred to the Clerk of the Court to enter appearance if that is the desire.

For Appellant: Mr. R. I. Arenstein of R. I. Arenstein.

For Respondent: In person.

NORTH-EASTERN NATIVE APPEAL COURT.

MYENI *v.* **MYENI.**

N.A.C. CASE No. 24 OF 1955.

ESHOWE: 20th July, 1955. Before Steenkamp, President, Ashton and Cowan, Members of the Court.

PRACTICE AND PROCEDURE.

APPEAL FROM CHIEF'S COURT.

Necessity for compliance with Rule No. 11 *of Government Notice No.* 2885 *of* 1951—*Chief's reasons for judgment—*

Return of case for such reasons to be furnished—Judgment to be considered afresh and record returned to Appeal Court.

Summary: An appeal from a Chief's Court came before the Native Commissioner but no reasons for judgment were furfurnished by the Chief, beyond recording their absence and his intention to proceed with the case the Presiding Officer did not explain why he made such a decision.

Held: That Section No. 11 of the Rules of Chief's Courts (Government Notice No. 2885 of 1951) must be strictly complied with.

Held further: That the Appeal Court may return a case to the Native Commissioner's Court to comply with the rule and may direct that the matter be re-considered and the case returned for the appeal to be heard.

Cases referred to:

Zulu *v.* Zulu, N.A.C. 1955, 64 (N.E.).

Zwane *v.* Sitole, 1947, N.A.C. (T. & N.), 30.

Gumede *v.* Nxumalo, N.A.C. 1953, 192 (N.E.).

Statutes, etc., referred to:

Section 11 of Chiefs' and Headmens' Courts—Regulations (Government Notice No. 2885 of 9th November, 1951).

Section 7, Old Chiefs' Courts' Rules (Government Notice No. 2255 of 21st December, 1928).

Appeal from the Court of the Native Commissioner, Ubombo.

Steenkamp (President), delivering the judgment of the Court:—

It is observed from the record of this appeal that the Chief's reasons for judgment were not filed and in this connection it is desired to quote an extract from a judgment delivered by this Court at Vryheid on 29th June, 1955, in the case of Zulu *v.* Zulu N.A.C., 1955, 64 (N.E.) in which the Chief's reasons for judgment were also not furnished:—

> "Section 11 of the rules for Chiefs' Courts (Government Notice No. 2885 of the 9th November, 1951), lays down that the Chief shall furnish his reasons for judgment not later than fourteen days after receiving notification of an appeal; that if the Chief fails to furnish his reasons for judgment the Native Commissioner may issue an order upon him to do so and finally that the Court of the Native Commissioner may in its discretion proceed with the hearing without the Chief's reasons for judgment.
>
> In section *seven* of the old rules for Chiefs' Courts (Government Notice No. 2255 of the 21st December, 1928), it was laid down that the Chief had to report forthwith his reasons for judgment to the Clerk of Court by whom they were to be recorded.
>
> This Court gave many decisions as to the necessity for compliance with the requirements that the Chief's reasons be furnished in terms of Rule 7 of the old rules and held that they formed part of the record. In the case of Zwane *v.* Sitoli, 1947, N.A.C. (T. & N.), 30, it was held that the appeal was not properly before the Court if the provisions of the rules were not complied with and that if the case were not properly before the Court the proceedings would be null and void.
>
> Those decisions were based on the old rules but they are applicable to the present rules except that under the latter the Court of the Native Commissioner may in its descretion proceed with the hearing without the Chief's reasons for judgment. On the new rules there have also been rulings regarding the necessity for a Chief's reasons to be filed and in Gumede *v.* Nxumalo, N.A.C. 1953, 192 (N.E.), it was emphasized that a Chief's reasons are a *sine qua non* in all appeals from Chiefs' Courts and if the Native Commissioner exercises his discretion—which is a judical and not an arbitrary one—in dispensing with them he must make a note on the record of the circumstances and his reasons for such dispensation.
>
> It follows that when the Chief's reasons are not furnished when an appeal comes before the Native Commissioner he may use his discretion as to whether he will proceed with the hearing and he must exercise that discretion judicially. He is not entitled to ignore altogether the fact that the reasons are not before him and in order to show that he has not done this he must record the fact and the circumstances and the reasons for his proceeding or not proceeding with the case."

The absence of the Chief's reasons for judgment was commented upon at the outset by appellant's counsel who informed the Court that although this was an irregularity he did not wish to take advantage of it on behalf of his client. The Native Commissioner made a note on the record to the effect that "the Court decides to continue with the case despite the Chief having failed to furnish reasons for judgment". As the issue in this case is dependent on pure Native Law it is very necessary to have the

Chief's reasons for deciding as he did more especially as at the time the events took place the Codes of 1891 and 1932 were not applicable to Zululand.

In the circumstances it is ordered as follows:—

"The judgment of the Native Commissioner is set aside; the Chief shall be called upon by the Native Commissioner to furnish his reasons for judgment within fourteen days of the date of a suitable notice served upon him. The Native Commissioner shall then, if the reasons are furnished take such reasons into consideration and if no reasons are furnished exercise his judicial discretion according to the rules in dispensing with them and thereafter give a fresh judgment. If this judgment is still adverse to the defendant the Native Commissioner shall remit the record to this Court for the consideration of the appeal on the merits at the next hearing of the Court at Eshowe on 25th October, 1955. The Native Commissioner shall inform the parties of the action taken. Costs of the appeal so far to be costs in the cause."

As stated, the correct decision in this case depends upon the Native Law in force in Zululand at the time the events on which it is based took place and it is essential that there should be no doubt regarding the facts. In this connection much depends upon the question whether or not the unions for which the *lobolo* was contributed took place. The Native Commissioner has found as a fact that they did—see paragraph 7 under the heading "A. Facts found proved" in his reasons for judgment on page 9 of the typed record and also paragraphs 1 and 2 under the heading "C. Reasons for drawing inferences from facts" on page 10 of the typed record. In this he was clearly deciding against the evidence and in re-considering the case after obtaining the Chief's reasons for judgment he should accept as a fact that these unions did not take place.

For Appellant: Mr. S. H. Brien (instructed by S. E. Henwood & Co.).

For Respondent: In person.

NORTH-EASTERN NATIVE APPEAL COURT.

MNGADI *v.* GUMEDE d.a.

N.A.C. CASE No. 88 OF 1954.

DURBAN: 25th July, 1955. Before Steenkamp, President, Ashton and Cowan, Members of the Court.

STATUTORY LAW.

STARE DECISIS RULE.

The effect of section seventy-two *of Act No.* 29 *of* 1926, *in transactions between Natives—Question whether termination of agreement terminates effect of statute*—Stare decisis *rule.*

Summary: Plaintiff entered into a written agreement with defendant for the sale of immovable property by instalments; the agreement contained a clause to the effect that if instalments

were not duly paid plaintiff could cancel the sale and retake the property; instalments not paid on due date followed by cancellation of agreement; plaintiff sued for ejectment of defendant who claimed relief under section *seventy-two* of Act No. 29 of 1926.

Held: That the *stare decisis* rule requires a Court to follow the previous decision unless the present case can be distinguished from it or that it was manifestly wrong.

Held further: That the judgment of this Court in the case of Mtimkulu *v.* Isiash Shembe, 1933, N.A.C. (T. & N.) 42 was manifestly wrong.

Held further: That the agreement was properly terminated and on its termination the rights defendant may have exercised under section *seventy-two* of Act No. 29 of 1926 were no longer available to him.

Cases referred to:

Mtimkulu *v.* Isiah Shembe. 1933. N.A.C. (T. & N.) 42.

Statutes, etc., referred to:

Section 72 of Act No. 29 of 1926.

Section 15 of the Native Administration Act (No. 38 of 1927).

Appeal from the Court of the Native Commissioner. Pinetown.

Steenkamp (President), delivering the judgment of the Court:—

In the Native Commissioner's Court the plaintiff (now respondent) sued the defendant (now appellant) for:—

(*a*) Cancellation of an agreement.

(*b*) Ejectment of defendant from certain property.

(*c*) Alternative relief.

(*d*) Costs of suit.

The written agreement, which the plaintiff relies on in his claim in the summons, is to the effect that the defendant purchased from her certain fixed property, viz. Erf No. 1640, Township of Clermont, Durban District, for £280 payable in instalments of £5 a month. In the event of any instalments not being paid on the due date, the plaintiff had the right to give defendant one month's notice, in writing, demanding payment and failing payment on the expiration of the month's notice, the plaintiff could cancel the agreement forthwith and retain for her own benefit and account, all moneys paid by the purchaser (defendant). In the summons the plaintiff avers that defendant failed to pay the instalments on the due date and on the 26th May, 1954, she gave defendant written notice calling upon him to pay the arrear instalments within one month. The defendant, notwithstanding the notice still neglected to pay the outstanding instalments and on the 26th June, 1954, he was notified. in writing, that plaintiff had cancelled the agreement and the property must be vacated.

In his plea the defendant admits the agreement but also declares as follows:—

4.

"Defendant avers that according to Law, he is entitled to a Mortgage Bond in favour of the plaintiff, and the transfer of the piece of land sold in terms of the agreement alleged in plaintiff's particulars of claim to the defendant. Defendant avers that he has paid more than half the purchase price of the land and he is therefore entitled to transfer of the land upon the passing of a Mortgage Bond in favour of the plaintiff."

5.

"Defendant has requested plaintiff to give him transfer, but the plaintiff fails, refuses and/or neglects to do so."

On the day of the hearing of the case no evidence was led but the following admissions by the legal representatives of the parties were recorded:—

"1. Parties admit entering into an agreement, the original of which is put in—Exhibit "A".

2. Parties admit that in terms of that Agreement defendant took occupation, and is still in occupation.

3. Parties admit that defendant has paid to plaintiff in terms of the Agreement a total of £155.

4. Parties admit that on 12th May, 1954, defendant was in arrear with instalments to an amount of £30, and that on that date plaintiff's solicitors wrote to defendant requesting the payment of these arrears within 30 days. Letter put in Exhibit "B".

5. Parties admit that defendant failed to pay the arrears within the 30 days aforesaid, and on 26th June, 1954, plaintiff's solicitors wrote to defendant cancelling agreement of sale by reason of defendant's failure to pay the arrears by that date. Letter Exhibit "C" handed in.

6. Parties admit that after defendant had received Exhibit "C" defendant's solicitors wrote to plaintiff's solicitors requesting transfer of the property and a bond in terms of section *seventy-two* of Act No. 29 of 1926.

7. Plaintiff's solicitors admit receiving such a letter but it cannot be produced nor can a copy."

The Native Commissioner gave judgment in favour of plaintiff as prayed with costs and against that judgment an appeal has been noted to this Court on the following grounds:—

"The Native Commissioner erred in holding as the contract had been cancelled, the provisions of section *seventy-two* of Act No. 29 of 1926 do not apply. The Act does not state when application for a bond should be made."

Argument in both Courts was confined to a proper interpretation of section *seventy-two* of Act No. 29 of 1926, but Council for appellant (defendant) quoted in this Court the case of Mtimkulu *v.* Isiah Shembe, 1933, N.A.C. (T. & N.) 42 and submitted that as the facts in this appeal are similar to those in that case this Court is bound by the *stare decisis* rule to follow the previous decision unless the present case can be distinguished from it or that the previous decision was manifestly wrong.

After careful examination of the judgment pronounced in the 1933 case it is clear that the Court held that the provisions of section 72 of Act No. 29 of 1926, were applicable in Native cases and then it proceeded of its own motion to apply those provisions to the case before it. But it is also clear from the section that it is only incumbent on the seller to pass tranfser to the buyer after the latter has paid a certain proportion of the purchase price and has made the demand for it as the section entitles him to do. But the purchaser never made the demand and on this ground the previous decision is thought by this Court to have been manifestly wrong.

There remains to consider the question whether the termination of the contract in terms of the agreement does or does not terminate the rights of the purchaser granted to him by the statute.

In the previous case the Court apparently held that the purchaser was entitled notwithstanding the cancellation of the sale to exercise his statutory right and have the property transferred on the conditions laid down but it gave its reasons for this decision as follows:—

> "We cannot, however, close our eyes to the fact that respondent had paid all but a small balance of the purchase price; that this balance is available to complete the payment; that the parties are Natives and that to recognise cancellation of the sale would result in a grave injustice. Furthermore, it seems to us that as the enactment in question was introduced in order, as the title of the Act sets out, "To amend the Insolvency Act (Act No. 32 of 1916), in certain respects, and to enact certain provision for the relief of debtors with a view to preventing insolvencies" that section 72 was inserted to meet cases of this very nature. It also seems to be an instance in which we should invoke the wide powers conferred upon this Court by section *fifteen* of the Native Administration Act."

It would seem that because the parties were Natives the Court thought itself entitled to adopt as a principle certain statutory rights which were not strictly applicable and it gave as its authority for this the wide powers it had under section *fifteen* of the Native Administration Act No. 38 of 1927. We find ourselves unable to accept such a proposition. The fact that the parties to a transaction are Natives does not give the Courts the right to afford them favourable treatment on that account unless the law itself which it is applying authorises such treatment. In this instance it did not and we find ourselves unable to consider ourselves bound by the decision quoted to us.

Section *seventy-two*, the provisions of which it is sought should be exercised in defendant's favour, lays down that every purchaser who, under an agreement of purchase of immovable property to pay the purchase price in instalments, having paid a certain propertion of it is entitled to demand the transfer of the property to him conditionally. But the only factor limiting the time when this demand may be made is when a stated proportion of the price has been paid. The time when this right expires is not specifically laid down but this Court considers that it cannot exist after the agreement has been terminated in accordance with its terms.

In the admissions made in the Native Commissioner's Court it was admitted that, the agreement was properly cancelled and that only after the cancellation did defendant seek to exercise the right which section *seventy-two* gave him. This Court holds—as the Native Commissioner held—that the time for exercising that right had passed and it follows that the judgment now appealed against was right.

It was contended that the inclusion in the summons of a request for an order for the cancellation of the agreement implied that the agreement had not in fact been cancelled but this contention cannot hold against the admitted facts one of which was that it was cancelled. Moreover, this contention was not one of the grounds of appeal.

The result is that the appeal must be dismissed with costs and it is ordered accordingly.

For Appellant: Adv. J. Gurwitz (instructed by J. W. van Aardt).

For Respondent: Mr. C. Cornish.

NORTH-EASTERN NATIVE APPEAL COURT.

GUMEDE *v.* **GUMEDE d.a.**

N.A.C. CASE No. 30 OF 1955.

DURBAN: 26th July, 1955. Before Steenkamp, President, Ashton and Nel, Members of the Court.

CUSTODY OF CHILDREN ON DIVORCE.

Dissolution of customary union not granted solely on ground of misconduct of one partner; interests of child sole deciding factor in awarding custody.

Summary: The divorce was granted at the instance of the wife but clearly both parties were to blame; the Native Commissioner awarded the custody of the female child aged nine years to plaintiff as he held her not to be the guilty party.

Held: That there was no evidence that it would be in the interest of the child that she should be awarded to the mother.

Held further: That the father being the guardian and entitled to the property rights in the child the order should not have been made unless it was shown that he was not a fit and proper person to have the custody.

Appeal from the Court of the Native Commissioner, Mapumulo.

Steenkamp (President), delivering the judgment of the Court:—

In granting the dissolution of a customary union in a suit between the wife and the husband, the Assistant Native Commissioner awarded the custody of a female child aged 9 years, to the wife.

There is no evidence on record that it would be in the interest of the child that she should be awarded to the mother. The divorce was not granted on the sole reason that the woman was entitled thereto because of her husband's misdeeds. The husband was awarded the return of 6 head of catle and therefore we must conclude that the Assistant Native Commissioner considered the wife was also to blame for the failure of the customary union. That being the case, the Assistant Native Commissioner should only have made the order he did if he was satisfied that the father who, after all, is the guardian and the one entitled to the property rights in the female child, is not a fit and proper person to have the custody.

To avoid the return of the record to the Assistant Native Commissioner to obtain the necessary evidence, this Court, while both parties argued their cases in person, ascertained that the woman intends getting married again and that she will leave the child with her brother who appeared in this Court to assist her. He, however, informed this Court that unless he is entitled to the property rights in the child, he would prefer not to have the child under his care.

The father of the child has informed us that his mother will look after the child and in fact the child has been with her ever since the mother left her husband. We are of opinion that the child should have been awarded to the father and consequently the application for the condonation of the late noting of the appeal is allowed; the appeal is allowed with costs and the Assistant Native Commissioner's judgment is altered by the deletion of paragraph (*c*) thereof and the substitution of the words "Defendant awarded the custody of the child."

Appellant in person.

Respondent in person.

NORTH-EASTERN NATIVE APPEAL COURT.

KUNENE *v.* **MKIZE.**

N.A.C. CASE No. 17 OF 1955.

DURBAN: 28th July, 1955. Before Steenkamp, President, Ashton and Nel, Members of the Court.

PARTNERSHIP.

Unstamped documents in evidence. Effect of dissolution of partnership; unstamped document not null and void; order to have unstamped document properly stamped.

Summary: Plaintiff and defendant entered into a partnership agreement which was reduced to writing but was not stamped: The Court ordered the ducument to be properly stamped before taking it into consideration as evidence: The partnership was dissolved by mutual consent and plaintiff sued defendant personally for the money he paid into the partnership.

Held: That on the dissolution of a partnership by mutual consent plaintiff partner can only recoup himself from the partnership assets not from defendant partner personally.

Held further that: An unstamped document handed in as evidence can only be taken into account after it has been stamped in terms of Act No. 30 of 1911.

Held further that: An unstamped document is not null and void and once it is properly stamped it is validated with retroactive effect and it assumes the status it would have had if it had been properly stamped in the first place.

Cases referred to:

De Meyer *v.* Bam. 1951 (4), S.A. 68 (N.P.D.)

Badat *v.* Corondimas, 1947 (2), S.A. 170 at 176.

Statutes, etc., referred to:

Section *twenty-two* (1) of the Stamp Duties and Fees Act (No. 30 of 1911).

Appeal from the Court of the Native Commissioner, Durban.

Steenkamp (President), delivering the judgment of the Court:—

It is not necessary to set out plaintiff's claim in full, nor the request for further particulars which consists of nine paragraphs and covers nearly two pages of typewritten matter, nor defendant's plea which consists of fifteen paragraphs covering three pages of typewritten matter nor the notice of appeal in which there are 8 grounds covering over two pages of typewritten matter.

The salient points in the claim and the other documents mentioned will be touched on in the course of this judgment. Suffice to state that the preparation of such voluminous matter as we find in the record would appear to be out of all proportion to what is necessary in the case now before us on appeal.

In his claim plaintiff avers that he and the defendant had entered into a partnership agreement which defendant repudiated after the partnership had been in existence for some time. Plaintiff had contributed certain sums of money to the partnership and he now claims repayment to him of the capital he had invested in the business which was run as a butchery.

Defendant in his pleadings denied the partnership but the evidence is so overwhelming in plaintiff's favour that it is not surprising that the Native Commissioner, in his facts found proved, came to the conclusion that a partnership was entered into and this finding is in fact supported by a written document.

One of the grounds of appeal is that the partnership agreement was not stamped in accordance with the Stamp Duties and Fees Act of 1911 and therefore the agreement is null and void. This aspect will be deal with later on.

The Native Commissioner gave judgement in favour of plaintiff for £109. 4s. and costs. Included in this judgment is an amount of £26. 10s. which plaintiff alleges defendant borrowed from him for the purpose of liquidating certain debts owing by his late father. The additional Native Commissioner has come to the conclusion that plaintiff has proved this loan of £26. 10s. but the Additional Native Commissioner has overlooked the fact that in the further particulars furnished by the plaintiff he mentions an amount of £26—as money advanced to pay a debt. It therefore follows that on this claim which this Court treats as a separate claim to that of the partnership business the plaintiff may not be granted judgment for more than £26. if any.

Here it is necessary to set out in detail a translation of the partnership agreement drawn up in the Zulu language and which formed Exhibit "E" to the record:—

KUNENE—MKIZE COMPANY.

1. I, Magdalene Kunene, widow, of the late Thomas Kunene District of Umzinto, together with my son Cyprian Kunene, hereby enter into agreement of partnership with one Mr. Remegius Mkhize, of Mapumulo District to carry on a business of a butchery at Stall No. 12. Native Meat Market, Victoria Street, Durban, for a period of nine (9) years after which we shall still renew our partnership if he so desires.
2. I, Magdalene Kunene and my son enter into this agreement by our working apparatus which we have agreed that they should be £100 and that Mr. Remigius Mkhize pays £100 cash to equalize our shares.
3. In this partnership we are equal, and our dividends will be paid after every six (6) months.
4. At present we are still paying all the debts left by the late Thomas Kunene. After we had finished all the debts Mr. Mkhize will be refunded his money.
5. All the money will be deposited in the Standard Bank of South Africa.
6. All accounts and debts will be paid by cheques duly signed by Cyprian Kunene and Remegius Mkhize. In the absence of either of the two, Magdalene Kunene and Josephine Mkhize will sign same.

The agreement is dated 30th April. 1954, but according to the evidence given by the plaintiff a verbal agreement was entered into during November, 1953, and on 30th November 1953, he gave defendant £15 and on 11th February, 1954 another £36. The balance of plaintiff's contribution as agreed upon was evidently made up from certain purchases of meat paid for by plaintiff out of his own pocket and not only of partnership funds as well as for rentals for the stall where the business was conducted. Plaintiff states that he purchased meat for £37 and there is evidence that he paid £12 as rental for the stall.

In his summons plaintiff alleges that during August, 1954, defendant repudiated the agreement. What this means is difficult to discern but in order to arrive at a reasonable and acceptable meaning of this allegation we have to look at the evidence. Plaintiff states:—

"On 28th August, 1954, defendant and I met at the stall. Defendant told me I had no share in the business. He repudiated the written agreement of partnership . . .

I accepted the defendant's repudiation of the partnership."

It is a matter of conjecture whether the partnership was dissolved by mutual consent or whether the defendant intended to convey the meaning that there never had been a partnership. Let this be as it may the hard fact remains that from November, 1953, until August, 1954, the business was conducted on a partnership basis and this Court must base its decision on that fact and that the plaintiff, by accepting the defendant's repudiation mutually agreed with him to end the partnership.

Once we come to the conclusion that the partnership had been dissolved by mutual consent then the next step is to decide what the effect of the dissolution is.

It is common cause that at various times plaintiff drew moneys from the business and as far as can be seen in the absence of properly drawn up accounts and debatement of these accounts the plaintiff might have helped himself to more than what was due to him and if that is so he might not be entitled to recover any moneys from the defendant.

Plaintiff kept the books and we hold the view that he should have prepared a proper statement of all the transactions in the business, the profits made and how the profits were distributed. If the business had been run at a loss then we do not see how the plaintiff can seriously ask the defendant to bear all the loss and still refund to plaintiff the £100 the latter had contributed towards the business.

Here it is desired to revert to the non-stamping of the deed of partnership. The defendant, in his grounds of appeal mentions that the non-stamping of the agreement rendered it null and void. He is under a misapprehension concerning this. Reference to section 22 (1) of the Stamp Duties and Fees Act, No. 30 of 1911, indicates that such a document is not null and void but that it may not be admitted or made available in evidence in any Court of Law until it is properly stamped and the penalties paid. Unfortunately the Court below did admit the unstamped document and it is now before this Court.

This Court, however, intimated that unless the document is properly stamped it is not prepared to take it into consideration. Counsel for respondent thereupon had it properly stamped before the Receiver of Revenue and paid the prescribed penalty. Once such a document is validated it is of retro-active affect *vide* case De Meyer *v.* Bam, 1951 (4) S.A. 68 (N.P.D.). In that case at page 71 appears "It was held by my brother Selke in the case Badat *v.* Corondimas, 1947 (2), S.A. 170 at 176 that when a document, which was ineffectual for want of proper stamping, is later stamped in the manner authorised by the Act and with payment of the prescribed penalties, the consequences which flow from the want of proper stamping are removed with retro-active effect and the document then assumes the status it would have had had it been properly stamped in the first place. In view of the foregoing the partnership agreement was properly before the Court and its contents can be rightly taken into account.

The dissolution by mutual consent not being unlawful we must now proceed to deal with the consequences of such a dissolution.

According to Wille and Milne on Mercantile Law on page 394 (11th Edition) the assets of a partnership will have to be realised or accounted for before any partner can claim his share.

The plaintiff having kept the books, is in the best position to prepare a statement and if he reckons that his share of the drawings during the existence of the partnership business was less than what his share was then and then only has he a claim.

The loan of £26. 10s. plaintiff alleges was a personal one to the defendant is a matter of proof. He has not satisfied this Court that this was a loan apart from the business and therefore on this claim he cannot succeed.

The other grounds of appeal which are immaterial need not be mentioned as they all fall away in view of the conclusions arrived at.

It is ordered that the appeal be and it is hereby allowed with costs and the Native Commissioner's judgment is altered to one of absolution from the instance with costs.

For Appellant: Mr. J. Royeppen.

For Respondent: Mr. I. N. Bawa.

NORTH-EASTERN NATIVE APPEAL COURT.

ZULU *v.* **MDHLETSHE.**

CASE No. 31 OF 1955.

DURBAN: 28th July, 1955. Before Steenkamp, President, Ashton and Nel, Members of the Court.

DEFAMATION: PRACTICE AND PROCEDURE.

Report made to Chief—Same Chief presiding at trial—Prejudice—Privilege—Truth of statement—Wording of judgment on appeal from a Chief's Court.

Summary: Plaintiff sued defendant in a Chief's Court for damages for defamation arising out of a report made to the same Chief. The Chief tried the case notwithstanding section *four* of Government Notice 2885 of 1951. Defendant pleaded privilege. On appeal to the Native Commissioner's Court the Native Commissioner gave "judgment for the plaintiff for £5 damages and costs."

Held: That as there was no bias against either of the parties by the Chief the fact that he tried the case was not a good ground of appeal.

Held further: That the occasion was privileged but the onus of showing whether the communication was made *mala fide* was upon plaintiff.

Held further: That the judgment in an appeal to a Native Commissioner's Court must indicate whether the appeal is successful or not and whether the Chief's judgment is upheld or not.

Statutes, etc., referred to:

Section 4 of Regulations for Chief's and Headmen's Courts (Government Notice No. 2885 of 9th November, 1951).

Appeal from the Court of the Native Commissioner's Court, Lower Tugela.

Ashton (Permanent Member), delivering the judgment of the Court.

This case was originally heard in a Chief's Court from which it was appealed to the Court of Native Commissioner and now it comes from that Court to this on appeal. In each instance the defendant was the appellant, judgment having been given against him for £5 damages and costs.

Plaintiff's claim originally was for £10 damages for defamation of character it being his allegation that defendant had said in public that he (plaintiff) had said he would do injury to the Chief if he (plaintiff) was not appointed an Induna by the Chief.

The Chief found that the statement was maliciously uttered in public and that it was defamatory and he accordingly awarded plaintiff £5 damages and costs.

The Native Commissioner before whom the Chief's judgment came on appeal gave judgment as follows "Judgment for the plaintiff for £5 damages and costs." (The form in which this judgment was made is the subject of comment later on).

Against the Native Commissioner's judgment appeal was entered on the following grounds:—

"(1) That the decision was against the weight of evidence; and

(*a*) that there discrepancies between the evidence of the plaintiff (respondent) and his witness George Lucas which the Native Commissioner did not take into account when deciding upon the credibility of the witnesses;

(*b*) that the Chief Phineas Zulu was a material witness in the action, and as the defendant (appellant) had once endeavoured to subpoena this witness, the Native Commissioner should have heard the evidence of this witness before giving judgment, particularly as both parties to the trial were unrepresented and illiterate;

(*c*) that the Assistant Magistrate Mr. G. A. Rall also appears from the record to have been a material witness, and his evidence should have been heard for the same reasons as set out in (*b*) above;

(*d*) that the letters mentioned in the record should have been produced at the trial, as they were material to the issue, and that the Native Commissioner should not have given judgment without such letters having been produced to him, and forming part of the record."

It is not proposed to go into the matter of an application by appellant to place certain affidavits before the Court to supplement the grounds (*b*) and (*c*) of the appeal nor into an attempt by appellant's counsel to persuade the Court that the Chief, being an interested party, should not have tried the case in the first place. The issue is clear and the decision can be arrived at without taking those factors into account.

It is true that section *four* of the Regulations for Chiefs' and Headmen's Civil Courts (Government Notice No. 2885, dated 9th November, 1951), provide that "No Chief shall adjudicate upon any matter or thing in which he is pecuniarily or personally interested" but it is obvious there that there was no bias against either or the parties by the Chief—if there had been any possibility of such it would surely have been exercised against the plaintiff and the judgment delivered clearly shows that this was not so.

The claim was in respect of a statement said to have been made by the defendant who, despite the fact that the Chief recorded a denial, actually admitted having made it. This admission was made in evidence as well as in a statement but it was qualified by a contention that it was his duty to make the report he did and that what he reported was true. This amounted to a defence of "privilege" and all that this Court has to decide is whether that defence was established or not.

It is not disputed that the occasion was privileged as the report made was of such a nature that a duty to convey it to the Chief did exist. But the burden of showing actual malice was upon plaintiff if he were to succeed in his claim. The question then which had to be decided was whether the communication was made *mala fide;* if the report was in itself false it would follow

that it was *mala fide*. This was the conclusion come to by the Native Commissioner and it remains to examine whether he came to that conclusion correctly.

Plaintiff himself denied that he made the statement and his witness George Lucas, who was said to have been present when plaintiff was alleged to have spoken the words complained of, admitted having been present on the occasion when plaintiff and defendant and others were gathered but denied emphatically that plaintiff uttered a threat to attack the Chief if he were not made an Induna.

Defendant admitted in evidence that—

> "when plaintiff made the statement to me about his appointment as Induna and that blood would be shed there were only present plaintiff, myself, last witness (George Lucas) Kwankwa Ndhletshe (plaintiff's son) and the man who is now deceased. No one else was present"

and defendant earlier in the case said he had "only his wife to call to prove that plaintiff made the statement alleged."

Defendant naturally did not insist on calling Kwankwa Mdhletshe, whose failure to appear was explained by plaintiff, and he did not call his wife so the Native Commissioner had to decide the question on the evidence of plaintiff and his witness George Lucas against that of defendant only. He accepted the version of plaintiff and his witness and from the reasons furnished by him it is manifest that he was right in doing so.

Having come to the conclusion that the defence put forward by defendant failed the Native Commissioner gave judgment for plaintiff in the sum of £5 and costs. Here he was in error for the case came before him on appeal. He should have pronounced judgment in the following terms "The appeal is dismissed with costs and the Chief's judgment is upheld."

The appeal to this Court accordingly fails and it is ordered that the appeal be and it is hereby dismissed with costs; the Native Commissioner's judgment, however, is hereby altered to read:—

> "The appeal is dismissed with costs and the Chief's judgment is upheld."

For Appellant: Mr. A. H. Humphrey (instructed by L. C. Smith & Kling).

For Respondent: Adv. R. Cadmen (instructed by Cowley & Cowley).

CENTRAL NATIVE APPEAL COURT.

SHABANGU *v.* **LATEGELE.**

N.A.C. CASE No. 18 OF 1955.

JOHANNESBURG: 25th August, 1955. Before Menge, Acting President, Smithers and Fenix, Members of the Court.

PRACTICE AND PROCEDURE.

Locus standi in judicio *of Native woman who is a partner in a customary union where claim is under Common Law.*

Summary: Plaintiff, now appellant, a Native woman, sued defendant, present respondent, for damages in respect of an assault. She was assisted by her husband to whom she was united by Native Custom. The Native Commissioner dismissed the summons on the ground that the woman had no *locus standi.*

Held: In the absence of any statutory provision affecting her capacity, and as the claim is one which is not governed by Native Law, the woman is in the position of a European minor with her husband as her guardian; and the summons was wrongly dismissed.

Cases referred to:

Mbata *v.* Ntanzi, 1945, N.A.C. (T. & N.) 98.

Statutes referred to:

Section *eleven* (3), Act No. 38 of 1927.

Appeal from the Court of the Native Commissioner, Johannesburg.

Menge, Acting President (delivering judgment of the Court):—

Anna Shabangu, cited as "a female married in community of property to Joseph Shabangu and duly assisted by him as far as needs be, according to law", sued the defendant, a Native constable, for £200 as damages in respect of an alleged assault committed on or about 6th June, 1954. Summons was issued on 27th September, 1954.

The plea is a denial of the assault and that the plaintiff suffered any damages.

Medical evidence was led on 15th February, 1955. The plaintiff did not give evidence on the claim, but, in reply to the Native Commissioner stated that she was married by Native Custom, not by civil rights.

Thereupon the case was postponed and did not come on again before 6th June, 1955.

Meanwhile on 17th February, 1955, plaintiff applied for the amendment of her summons so as to cite the plaintiff as follows:—

> Anna Shabangu, a female married by Native Custom to Joseph Shabangu and herein duly assisted by him as far as need be.

The defendant also applied for an amendment of pleadings. He asked leave to file a preliminary plea to the effect that the plaintiff's action is barred through failure to comply with section *thirty* of the Police Act, 1912.

No decision was taken as to the defendant's application, for at the resumed hearing on the 6th June, 1955, the Court dismissed the summons on the ground that plaintiff had no *locus standi.* When the Court took that decision the plaintiff applied to have the summons amended so as to cite the plaintiff's husband as plaintiff in his capacity as her guardian. To this the State Attorney's representative who appeared for the defendant, objected as this amendment would introduce a new party into the action; and this objection was upheld.

The plaintiff now appeals on the grounds, firstly, that this objection should not have been upheld, i.e. that the husband should have been substituted; and, secondly, that "the learned Commissioner erred in holding that a Native female married by Native Custom is not entitled to bring an action for damages in her own name duly assisted by her husband."

As to the first of these grounds it would seem that the objection to plaintiff's application was rightly upheld, see Coetzee *v.* Steyn, 1955 (3), S.A. 48 (O); but it is not necessary to deal further with this aspect as the appeal must succeed on the second ground.

In his reasons for judgment the Native Commissioner states "In Common Law a minor or a married woman has *locus standi* although imperfect. This, however, can be implemented by the assistance of the guardian or of the husband as the case may be. But under Native Law and Custom a wife has no such imperfect *locus standi,* but none at all. It is therefore not sufficient that

she be assisted. The only person who can sue or be sued on her behalf is the husband himself in his capacity as her legal guardian."

It seems that section *eleven* (3) of the Native Administration Act has been overlooked. This sub-section makes it quite clear that the capacity of a Native woman to enforce her rights in any Court of Law shall be determined as if she were a European. There are only two exceptions to this: The first operates where the capacity is affected by statutory provision. I am not aware of any such provision affecting this case and none has been cited to us. The second operates when the existence or extent of the right concerned depends upon or is governed by Native Law. In the present case the alleged right to damages flows from the common Law and does not depend upon and is not governed by Native Law. In fact, as was said in the case of Mbata *v.* Ntanzi, 1945. N.A.C. (T. & N.) 98, the idea of personal claims for damages for injuries, e.g. to the person, is foreign to Native Law. Consequently neither exception is applicable in this case. For the rest the sub-section merely stipulates that "a Native woman who is a partner in a customary union . . . shall be deemed to be a minor and her husband shall be deemed to be her guardian."

Now the Native Commissioner has rightly stated that in Common Law the imperfect capacity of a minor can be implemented by the assistance of the guardian. Consequently, in as much as the sub-section (in the absence of any exception operating in this particular case) enjoins that the woman's capacity must be determined as if she were a European minor, the Native Commissioner should have allowed the amendment of the summons. There is no suggestion that it would cause any prejudice.

The appeal is allowed with costs. The Native Commissioner's judgment is set aside and the matter is referred back for further hearing on the basis of the citation of plaintiff as set out in the application of the 17th February, 1955.

For Appellant: Mr. R. Michel of Messrs. Helman & Michel.

For Respondent: Mr. W. J. Badenhorst, on behalf of the State Attorney.

SOUTHERN NATIVE APPEAL COURT.

DIMAZA *v.* **GXALABA.**

N.A.C. CASE No. 32 OF 1955.

PORT ST. JOHNS: 22nd September, 1955. Before Balk, President, Warner and Doran, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Appeal from judgment of Native Commissioner's Court dismissing appeal from judgment of Chief's Court—Plaintiff bound by his claim as set out in Chief's written record.

Summary: Plaintiff's claim as set out in the Chief's written record read "Plaintiff claimed 3 head of cattle from the defendant. He stated that he found defendant kissing his wife one night on the road."

The basis of plaintiff's claim was actually that of adultery. Plaintiff, however, did not challenge the correctness of the Chief's written record nor did he amplify his claim in terms of the Rules of Court.

Held: That as plaintiff's claim as set out in the Chief's written record did not appear to be actionable, and as plaintiff did not challenge the correctness of the Chief's written record or amplify his claim as provided for in the Rules of Court, he was, in the subsequent proceedings in the Native Commissioner's Court, bound by his claim as recorded by the Chief's Court.

Cases referred to:
Kumalo *v.* Kumalo, 1953, N.A.C. 4 (N.E.)
Mayibade *v.* Ncologwana, 1 N.A.C. (S.D.) 150.

Legislation referred to:
Section 6, 7, 8 (2) (*a*), 11 and 12 of Government Notice No. 2885, dated 9th November, 1951 (as amended).

Appeal from the Court of the Native Commissioner, Ngqeleni. Balk: (President).

This is an appeal from the judgment of a Native Commissioner's Court dismissing with costs an appeal from the judgment of a Chief's Court given for defendant (now respondent) in an action in which he was sued by the plaintiff (present appellant) for three head of cattle on the ground that "he (plaintiff) found defendant kissing his (plaintiff's) wife one night on the road."

In dismissing the appeal the Native Commissioner altered the Chief's judgment to one of absolution from the instance with costs.

The grounds of appeal to this Court are:—

"1. That the judgment was against the weight of evidence and the probabilities of the case.

2. That the Native Commissioner erred in allowing himself to be influenced by the Chief's reasons for judgment and thus basing his judgment largely on the fact that the summons issued in the Chief's Court alleged that plaintiff had found defendant kissing his wife, whereas his evidence sought to establish a catch in actual adultery."

Whilst the cause of action in the Chief's Court is that the plaintiff found the defendant kissing the former's wife one night on a road, it is manifest from the evidence for plaintiff in the Native Commissioner's Court that he based his claim on having caught the defendant in the act whilst the latter was committing adultery with the former's wife.

As pointed out in the judgment in Kumalo *v.* Kumalo, 1953, N.A.C. 4 (N.E.), the criterion in so far as the pleadings and judgment in a Chief's Court are concerned, is, in terms of the relative Regulations, published under Government Notice No. 2885 of 1951, as amended [see section *six* and *seven* and the provisos to sections 8 (2) (*a*) and 9 (2)] the Chief's written record and unless the correctness of such record is challenged, the particulars contained therein fall to be accepted as reflecting the true position.

In the instant case, the claim as set out in the Chief's written record reads "Plaintiff claimed 3 head of cattle from the defendant. He stated that he found defendant kissing his wife one night on the road."

The plaintiff did not challenge the correctness of that record nor did he amplify his claim in terms of section 12 of the abovementioned Regulations.

It follows that the plaintiff is bound by his claim as set out in the Chief's written record and apart from that fact that the claim in that form does not appear to be actionable, see Mayibade *v.* Mcologwana, 1 N.A.C. (S.D.) 150, the Native Commissioner, in assessing the probative value of the evidence in his Court in the instant case, properly took cognizance of the averment in the claim as formulated in the Chief's Court; and, as these two versions are obviously irreconcilable and the defendant denied the adultery, the Native Commissioner properly found that the plaintiff had not established his case.

I am therefore of opinion that the appeal to this Court should be dismissed with costs.

It is observed that the Chief was requested by the Clerk of the Court to furnish a written record of the proceedings in the instant case in his Court. In this connection it must be pointed out that a record of the proceedings is not required, all that is necessary being the information specified in section 6 and 11 of the Regulations referred to above.

Warner (Permanent Member): I concur.

Doran (Member): I concur.

For Appellant: M. Birkett, Port St. Johns.

For Respondent: F. C. W. Stanford, Flagstaff.

SOUTHERN NATIVE APPEAL COURT.

MALUFAHLA *v.* **KALANKOMO.**

N.A.C. CASE No. 36 OF 1955.

PORT ST. JOHNS: 22nd September, 1955. Before Balk, President, Warner and Doran, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure Corroboration of woman's testimony in action for adultery—The criterion in so far as the pleadings and judgment in Chief's Court are concerned is the Chief's written record—Recall of witness in terms of section fifty-three (12) *of Rules for Native Commissioners' Courts after defendant's attorney's address to Court.*

Summary: In an appeal from a Chief's Court to a Native Commissioner's Court in an action for adultery the latter Court, after the attorney for defendant in his address to Court had pointed out a weakness in the evidence given by plaintiff's wife, recalled that witness to amplify the evidence given by her in the Chief's Court.

Defendant maintained that this action on the part of the Native Commissioner's Court was irregular and prejudicial to him.

Held: (1) That the criterion in so far as the pleadings and judgment in a Chief's Court are concerned is the Chief's written record, and where the correctness of that record is not challenged the defendant's admission in the Chief's Court stands.

(2) That where a Native Commissioner's Court exercises its power to recall a witness in terms of Rule 53 (12) of the Rules for Native Commissioners' Courts, no prejudice can result therefrom where the opposite party is permitted to cross-examine the witness or to bring any evidence in rebuttal of any additional testimony given by the recalled witness.

Cases referred to:

Ngquze *v.* Ngquze, 1 N.A.C. (S.D.) 274.

Kumalo *v.* Kumalo, 1953, N.A.C. 4 (N.E.)

Legislation referred to:

Sections 6, 7, 8 (2) (*a*) and 9 (2) of Government Notice No. 2885 of 1951 (as amended).

Section 53 (12) of Government Notice No. 2886 of 1951 (as amended).

Appeal from the Court of the Native Commissioner, Bizana. Balk (President).—

This is an appeal from the judgment of a Native Commissioner's Court dismissing with costs an appeal from the judgment of a Chief's Court for plaintiff (now respondent) in an action in which he sued the defendant (present appellant) for five head of cattle or their value £40 as damages for adultery committed by the latter with the former's wife as a result of which she was rendered pregnant.

The grounds of appeal are:—

"1. That the judgment is against the weight of the evidence and probabilities of the case and lacks the required corroboration of the woman's testimony and is thus bad in law.

2. That the proceedings were irregular and prejudicial to the defendant and thus bad in law in that the Court after the attorney for the defendant in his address to the Court had pointed out that onus of proof of adultery lay on plaintiff who failed to discharge same in that *inter alia* his wife had failed to show how she slept with the defendant, whereupon re-called plaintiff's wife who then stated defendant stripped himself of his jacket, shirt (which has no interference on intercourse) and trousers and slept naked:

She never disclosed evidence of marks of incissions in Headman Xakatile's Court of first instance." (sic).

According to the evidence of the plaintiff's wife in the Native Commissioner's Court, the defendant committed adultery with her during her husband's absence at work, one Mtuntsula acting as go-between, and as a result of that adultery a child was born to her. She further stated that she had observed certain marks just above the defendant's navel when he had cohabited with her during the daytime.

Her testimony is amply corroborated by that of Mtuntsula. There are, however, certain features in their evidence which call for comment. In the first place, as admitted by Mtuntsula, a male, in cross-examination, it is unusual for men to act as go-betweens, see Ngquze *v.* Ngquze, 1 N.A.C. (S.D.) 274. Secondly, there is a discrepancy between his evidence and that of the plaintiff's wife as to whether he spoke when her "stomach" was taken to the defendant. He stated that he had then said that he was the go-between and she stated that he did not speak at the time. But these two weaknesses are in my view far outweighed by two important factors, viz: firstly, the defendent's admission, embodied in the particulars of his defence as set out in the Chief's written record that he had committed the adultery and secondly, the marks on the defendant's body as testified to by his own witness. Lindaswe.

As, in terms of the Regulations for Chief's and Headmen's Civil Courts, published under Government Notice No. 2885 of 1951, as amended [see sections *six* and *seven* and the provisos to sections *eight* (2) (*a*) and *nine* (2)] the criterion in so far as the pleadings and judgment in a Chief's Court are concerned, is the Chief's written record and as the correctness of that record has not been challenged in the instant case, the defendant's admission in the Chief's Court that he committed adultery stands, see Kumalo *v.* Kumalo, 1953, N.A.C. 4 (N.E.) Here it should be mentioned that the defendant did not restate his defence in terms of section 12 of the above-mentioned Regulations.

As regards the marks on the defendant's body. it is manifest from the evidence of his own witness, Lindaswe, that they are very faint and only discernible at very close range and as these marks are on an unexposed part of the defendant's body when he is clothed, these factors serve to corroborate the testimony of the plaintiff's wife in the Native Commissioner's Court. It should be added that the defendant admitted in cross-examination in the Native Commissioner's Court that the plaintiff's wife was never near him at *mjadu* dances. The non-mention of these marks by the plaintiff's wife at the initial investigation at Lindaswe's kraal, does not appear to have been put to her in cross-examination in the Native Commissioner's Court so that this factor can hardly be said to weaken her evidence as she may well have been able to give a good explanation for the omission. It follows that the first ground of appeal fails.

As regards the second ground of appeal, apart from the fact that the details of the acts of adultery given by the plaintiff's wife on her recall by the Court, do not, to my mind, take the plaintiff's case further, it was open to the Court to recall her in terms of Rule 53 (12) of the Rules for Native Commissioners' Courts, published under Government Notice No. 2886 of 1951, as amended. That being so, and, as there is nothing to indicate that the defendant's attorney was not permitted to cross-examine this witness on her recall or to bring any evidence in rebuttal of the testimony then given by her, there can be no question of any prejudice to the defendant so that this ground of appeal also fails and the appeal to this Court should be dismissed with costs.

Warner, Permanent Member: I concur.

Doran, Member: I concur.

For Appellant: Mr. Ntwasa: Flagstaff.

For Respondent: Mr. Birkett: Port St. Johns.

SOUTHERN NATIVE APPEAL COURT.

MGIJIMI *v.* **MGIJIMI and ANOTHER.**

N.A.C. CASE No. 44 OF 1955.

PORT ST. JOHNS: 22nd September, 1955. Before Balk, President, Warner and Doran, Members of the Court.

NATIVE LAW OF SUCCESSION. (PONDO CUSTOM).

LAW OF PROCEDURE.

Native customary union—Rebuttal of presumption pater est quem nuptiae demonstrant—*Birth of son to wife at her people's kraal four years after husband's absence at work—No action for adultery instituted—In Pondo Custom adulterine child not entitled to succeed.*

Practice and Procedure—Effect of dismissal of plaintiff's claim by Chief's Court.

Summary: Plaintiff was born to first defendant during the subsistence of the latter's customary union with the deceased and whilst the deceased was still alive. The birth, however, took place at first defendant's people's kraal four years after her husband had been absent at work. When first defendant's husband returned home after an absence of fourteen years he did not institute an action for adultery.

In an action, which is the subject of this appeal, plaintiff sought an order in the Native Commissioner's Court declaring him to be the heir of the deceased. The Native Commissioner found, however, that the presumption of legitimacy had been rebutted and entered judgment for defendants.

In his appeal against the Native Commissioner's judgment the plaintiff also claimed that in a previous action of a similar nature in the Chief's Court he had been unsuccessfully sued by second defendant and that as there had been no appeal against that judgment the matter was *res judicata.*

Held: (1) Plaintiff, being an adulterine child, is according to Pondo Custom (which applies in this case) not entitled to succeed to the deceased's estate.

(2) That the judgment of the Chief's Court, in the previous action referred to, was the dismissal of the claim brought by the then plaintiff, and as such a judgment amounts to one of absolution from the instance it cannot be regarded as final and cannot therefore found a defence of *res judicata.*

Cases referred to:

Ngxawum *v.* Sibaca, 1 N.A.C. (S.D.) 144.

Mbulawa *v.* Manziwa, 1936, N.A.C. (C. & O.) 76.

Becker *v.* Wertheim, Becker and Leveson, 41 P.H., F.34 (A.D.)

Umvovo *v.* Umvovo, 1953, S.A. 195 (A.D.), 199 and 200.

Appeal from the Court of the Native Commissioner, Bizana.

Balk (President):—

In this action brought by the plaintiff (present appellant) against his mother, the first defendant, in a Native Commissioner's Court, he sought an order declaring him to be the heir of the late Mgijima Ndzipo (hereafter referred to as the deceased), and requiring the first defendant to have transferred to him in the dipping registers and to return to him the livestock in the deceased's estate, viz. six head of cattle and fifteen sheep, plus four head of cattle of which he alleged he was the owner, having personally acquired them, or to pay him their total value amounting to £130.

In the particulars of claim it was averred that—

"(*a*) plaintiff is the eldest son and heir of his late father Mgijimi Ndzipo and was so regarded by him during his lifetime at all times material and the defendant is the mother of plaintiff and widow of the late Mgijimi Ndzipo;

(*b*) plaintiff is the owner of four cattle which he personally acquired and values them at £10 each, and there are six estate cattle, one belonged to his late father Mgijimi Ndzipo and five are *lobolo* cattle for Nogoduka a daughter of the late Mgijimi Ndzipo, also valued at £10 each; 15 estate sheep valued at £2 each, which belonged to late Mgijimi Ndzipo;

(*c*) that despite demand and despite the fact that in a case between him (plaintiff) and one Mbuyelwa Mgijimi heard last year in Qaukeni Court plaintiff was declared heir of the late Mgijimi Ndzipo and entitled as such to his estate property, the defendant unlawfully refuses to regard plaintiff as the rightful heir and refuses to have cattle claimed transferred to the plaintiff. All stock is presently registered in the name of the defendant, in the dipping registers."

An application for the joinder of another of the first defendant's sons as second defendant was granted by the Court.
The defendants pleaded—

"(1) The defendants deny that the plaintiff is the heir of the late Mgijimi Ndzipo and deny that he is Mgijimi's son;

(2) defendants admit that the defendant Mamelana is the widow of Mgijimi and she is the mother of the plaintiff;

(3) In reply to para. 3 the defendants state that they know of 10 head of cattle and 15 sheep which are in possession of the defendant Mamelana at her kraal (being the kraal of the late Mgijimi)—of these ten head only eight head are part of the estate of the late Mgijimi—two of the cattle the defendants believe to be the property of Joel Badaza but there is a case pending in this Court to decide whether these cattle belong to Joel Badaza or to Siwisa Jokazi, of the 15 sheep, 12 are the personal property of the defendant Mamelana and 3 are the property of one Pelelekaya; the defendants have no cattle or sheep belonging to the plaintiff in their possession.

(4) The defendants admit that they do not recognise the plaintiff as heir of Mgijimi and they deny that he was declared to be the heir by any judgment of any Court.

(5) The defendants state that No. 2 defendant Mbuyelwa is the only surviving son of the late Mgijimi and he is Mgijimi's heir, and owner of Mgijimi's estate.

(6) The defendants plead further that plaintiff resides at his own kraal separate from that of defendants, that defendants reside at the kraal of the late Mgijimi and defendants plead that so long as defendant Mamelana remains at the kraal of her late husband she is entitled to the custody of the estate for her maintenance.

Wherefore the defendants pray that the plaintiff's claims may be dismissed with costs and that defendant Mbuyelwa may be declared the rightful heir of the late Mgijimi and that defendant Mamelana may be declared to be entitled to the custody of Mgijimi's estate so long as she remains at the kraal of the said Mgijimi."

The plaintiff objected and replied to the pleas as follows:—

"Plaintiff objects to plea being filed and allowed in by the second defendant and states second defendant sued him (plaintiff) in the Chief's Court, Qaukeni, seeking to be declared heir of the late Mgijimi and plaintiff's claim was dismissed on 12th August, 1952, after evidence on both sides had been led, as second defendant was found not to be the rightful heir. Defendant No. 2, Mbuyelwa Mgijimi, never appealed in respect of his claim and his pleading in this case should be expunged as it is an attempt to circumvent the Qaukeni judgment and matter is *res judicata*. Wherefore plaintiff prays that second defendant's claim be dismissed with costs.

Should objection be disallowed but not otherwise, then plaintiff in replication says:—

Save as admitted plaintiff denies all the allegations of fact and conclusions of law contained in defendant's plea. He joins issue with the defendants and repeats his claims as in the summons and again prays for judgment with costs. He adds he never intended to have first defendant driven away from her husband's kraal, but must consult and recognise plaintiff as heir and administrator of late Mgijimi's estate, in respect of plaintiff and second defendant."

Judgment was entered for the defendant's as prayed, with costs, and the appeal is brought only against that portion of the judgment declaring the second defendant to be the heir of the deceased and is based on the following grounds:—

"(1) That the judgment is against the weight of the evidence and probabilities of the case and is bad in law in that:—

(*a*) The greatest possible proof and irresistable evidence is required in law to rebut the presumption *pater est quem nuptiae demonstrant,* and it is respectfully submitted that the Court should have found and declared that plaintiff (now appellant) is the rightful heir of the late Mgijimi and entitled to custody of the latter's estate, as onus to disinherit plaintiff was not discharged.

(*b*) That on the record and pleadings as between plaintiff Siweza Mgijimi and second defendant Mbuyelwa Mgijimi now declared heir, matter was *res judicata* as second defendant (Mbuyelwa Mgijimi) in a competent Chief's Court, namely Qaukeni Court Case No. 464/1952 (registered No. 25/1952, Bizana) had previously and unsuccessfully sued plaintiff (now appellant) whereat first defendant gave evidence against plaintiff (now appellant) and no appeal was noted against the Chief's judgment delivered after evidence was taken from the parties and their witnesses."

It is manifest from the evidence for the defendants that the plaintiff was born to the first defendant during the subsistence of her customary union with the deceased and whilst the latter was still alive so that there is a presumption that the plaintiff is a legitimate son of that union, see Ngxawum *v.* Sibaca, 1 N.A.C. (S.D.) 144; consequently the question to be determined is whether or not this presumption has been rebutted.

According to the first defendant's evidence, she had four children by the deceased after she had entered into a customary union with him. Of these four children, only one, a girl, survived. The first defendant was then *telekaed* by her people for further *lobola.* A year thereafter the deceased left for work without having *putumaed* the first defendant and remained away from home for 14 years. The first defendant bore the plaintiff after the deceased had been away from home for four years, the plaintiff's natural father being one Kosana Msali. Later she had another son by Kosana, viz. Velelekaya. When the deceased returned home after the absence of 14 years, be *putumaed* the first defendant by the payment of two head of cattle and she then returned to his kraal. Thereafter she bore the second defendant by the deceased. The first defendant left the plaintiff and Velelekaya at her people's kraal when she returned to the deceased. Later she visited her people's kraal and found Velelekaya unhappy. She thereupon brought him to deceased's kraal. The plaintiff later also came to that kraal. The deceased called a meeting of relatives to make known that the plaintiff and Velelekaya were adulterine children whom he had left at the kraal of the first defendant's people when he *putumaed* her. The deceased told this meeting that he did not want these children at his kraal and that they should return to the kraal of the first defendant's people. On the first defendant's objecting thereto and adding that the deceased was thereby also turning her away, he agreed to allow them to remain at his kraal. The deceased did not sue Kosana for damages for adultery because he blamed himself for having remained away from home so long.

As pointed out by the Assistant Native Commissioner in his reasons for judgment, the deceased's close relatives, called by the defendants' all bore out the first defendant's version and it seems

to me that that version rings true. The plaintiff was unable to suggest why the close relatives called by the defendants should all have given false evidence against him as alleged by him. Moreover, his only witness, a neighbour, admitted that he had frequently been away at work and his evidence does not assist the plaintiff. It is true that it is unusual for Natives not to claim damages for adultery even where they have been absent from home for lengthy periods, but here the explanation given does not appear to be unreasonable in view of all the circumstances.

In these circumstances it seems to me that the Assistant Native Commissioner cannot be said to have erred in his finding that the presumption of legitimacy had been rebutted by the evidence for the defendants; and, being an adulterine child, the plaintiff is, according to Pondo Custom which applies here, not entitled to succeed to the deceased's estate, see Mbulawa *v.* Manziwa, 1936, N.A.C. (C. & O.) 76. The question of disinherison does not arise and the first ground of appeal therefore fails.

Turning to the remaining ground of appeal, it is manifest from the record of the former proceedings relied upon by the plaintiff to found a defence of *res judicata* that the judgment therein was the dismissal of the claim brought by the then plaintiff (present second defendant) and as such a judgment amounts to one of absolution from the instance, see Becker *v.* Wertheim, Becker and Leveson, 41 P.H., F. 34 (A.D.), it cannot be regarded as final and cannot therefore found a defence of *res judicata*, see Umvovo *v.* Umvovo, 1953, S.A. 195 (A.D.) at pages 199 and 200.

The appeal accordingly falls to be dismissed with costs.

Warner, Permanent Member: I concur.

Doran, Member: I concur.

For Appellant: Mr. T. Ntwasa, Flagstaff.

For Respondent: Mr. H. H. Birkett, Port St. Johns.

CENTRAL NATIVE DIVORCE COURT.

LUTU *v.* LUTU and NCIWENI.

N.D.C. CASE No. 360 OF 1955.

JOHANNESBURG: 29th September, 1955. Before W. O. H. Menge, Esq., President. "A" Division.

DIVORCE: CLAIM FOR DAMAGES AGAINST CO-RESPONDENT.

Jurisdiction of Native Divorce Courts under section ten *of Act No.* 9 *of* 1929, *as amended.*

Summary: Plaintiff sued his wife for divorce on the ground of her adultery with the second defendant, and the latter for £200 damages in respect of the adultery. The action failed on the merits, both the claims for divorce and for damages being dismissed; but the Court considered the question whether it was empowered to entertain the claim for damages against the co-respondent.

Held: That the Native Divorce Courts have power to hear and determine claims for damages against co-respondents in suits for divorce.

Cases referred to:

Van Wyk *v.* van Wyk, 1952 (1) S.A. 760.
Garlicks Wholesale *v.* Davis, 1927, C.P.D. 185.
Baker *v.* Baker and Ano., 1930, C.P.D. 231.
Cloete *v.* Cloete, 1931, W.L.D. 98.
Moatse *v.* Moatse, 1944, T.P.D. 246.

Statutes, etc., referred to:

Section *ten* (1), Act No. 9 of 1929, as amended, by section *twenty-seven* of Act No. 56 of 1949.

Menge (President):—

On the 26th September, 1955, the plaintiff before me sued his wife, first defendant, for divorce on the ground of adultery with second defendant, and the latter for £200 damages in respect of the adultery. The plaintiff was represented by Counsel, Mr. Manners, and the defendants appeared in person.

There is no reported decision on the question whether the Native Divorce Courts are empowered to hear such claims against co-respondents, but I have had occasion to peruse a copy of a recent judgment of the Southern Native Divorce Court where the point was considered, and in which the Court held that it had no jurisdiction to hear such a claim. As I understand it the reasoning is, briefly, that the Native Divorce Courts, being creatures of statute, have no greater jurisdiction than the statute confers. Further, in accordance with the judgment in the case of van Wyk *v.* van Wyk, 1952 (1), S.A. 760 (N), a claim for damages against a co-respondent is of a different nature altogether from the claim for divorce, and the mere fact that a Court has divorce jurisdiction does not in itself confer jurisdiction over the ancillary claim. As, then, the legislature did not specifically confer jurisdiction over such an ancillary claim, the Native Divorce Courts cannot deal with it.

In view of this judgment I asked Mr. Manners to argue the question. Defendant No. 2 did not wish to challenge the Court's power to try the issue. Mr. Manners made a three-fold submission. He argued that under the empowering section [section *ten* (1) of Act No. 9 of 1929, as amended], such a claim was a matter arising out of the suit of divorce; that courts frown upon a multiplicity of actions, and that some strange results are likely to follow if a plaintiff must split up his action before two separate tribunals of different status.

I held that the Court has jurisdiction to try the issue of damages against second defendant, and undertook to give my reasons later.

I do so now.

Section *ten* (1) of Act No. 9 of 1929, as amended, by section *twenty-seven* of Act No. 56 of 1949, sets up Native Divorce Courts with jurisdiction "to hear and determine suits of nullity, divorce and separation between Natives domiciled within their respective areas of jurisdiction in respect of marriages and to decide any question arising therefrom". (The word "therefrom" replaces the original words which read: "out of any such marriage which is not cognisable by a Native Commissioner's Court established under section *ten* of the Principal Act"—i.e. Act No. 38 of 1927).

Prior to Act No. 9 of 1929 only the Supreme Court could exercise those powers. The jurisdiction which section *ten* (1) of the Act confers on the Native Divorce Courts is, therefore, the one and only jurisdiction which could have been in the mind of the legislature at the time—that exercised by the Supreme Court.

It is, therefore, necessary to examine the divorce jurisdiction of the Supreme Court. Now, an action (or suit—the words are synonymous) in its ordinary meaning denotes the whole case covered by the summons, see Garlicks Wholesale *v.* Davis, 1927, C.P.D. 185. But it is the practice to include a claim for damages

against a co-respondent in the summons. Not only is this the established practice (ever since 1891 according to van Zyl's "The Judicial Practice of S.A."), but the courts refuse to let the claim be dealt with in a separate action unless there are exceptional circumstances (see Baker *v.* Baker and Ano., 1930, C.P.D. 231, and Cloete *v.* Cloete, 1931, W.L.D. 98). The law of divorce followed in the Supreme Court in this regard can, therefore, be stated thus: where a party desires to sue for a divorce on the grounds of adultery and to claim damages from the co-respondent, he must pursue both claims simultaneously in one and the same action.

If this is the law as applied in the Supreme Court, the same law must be applicable in the Native Divorce Courts. For if the legislature had intended that the Native Divorce Courts should have a divorce jurisdiction different to that of the Supreme Court; if it had said: "You shall have jurisdiction, but involving quite different legal principles to those followed by the Supreme Court: you shall in fact apply a different divorce law", then it would have had to use very clear language to give expression to such a somewhat strange proposition. But so far from doing that, the legislature seems to have done the very opposite. It has laid down that any matter arising from a divorce suit can be determined by the Court. But it seems to me that Mr. Manner's submission is correct that the questions whether the co-respondent committed the delict, and, if he did, whether he should be mulcted in damages, are questions which arise from the suit in as much as the summons embodies such a claim for damages in accordance with established principles as laid down by the Supreme Court.

As to van Wyk's case, on which the judgment of the Southern Divorce Court is based, this lays down that the action against the co-respondent is a separate matter—a claim "of a different nature altogether"; and that the mere fact that the Natal Provincial Division (the Court of the plaintiff's husband's domicile) had jurisdiction to hear an action by him against his wife for divorce on the ground of adultery with X, is not in itself sufficient to give the Court jurisdiction to hear a claim for damages against X if the adultery was committed outside the Court's jurisdiction. With respect, no one would wish to quarrel with that decision. Indeed, the legal principle enunciated therein appears already in the 1923 edition of Beck's "Theory and Principles of Pleading in Civil Actions". In accordance with that principle a Native Divorce Court, too, would not have jurisdiction if the adultery were committed outside its area of jurisdiction or if the co-respondent was, say, a coloured person. But, as Mr. Manners has pointed out, there is nothing in van Wyk's case to suggest that the Native Divorce Court would not have jurisdiction if the co-respondent is a Native and the cause of action arises within its jurisdiction. True, the damages claim is separate and unrelated to the main (divorce) claim; but it is part and parcel of the main action and must, according to law, be pursued simultaneously and as part of the main action. To argue otherwise is to confuse "claim" with "action".

It is difficult to think of adequate reasons why the legislature should have intended the Native Courts to have a lesser jurisdiction in matters of divorce than the Supreme Court. I also think that the view I take of this question of jurisdiction finds a measure of support in the attitude of Blackwell, J., in Moatse *v.* Moatse, 1944, T.P.D. 246, having regard to the fact that the section in question at the time stood as originally worded and before the sweeping change wrought by the amendment of 1949.

For the foregoing reasons I felt that I could not follow the decision of the Southern Native Divorce Court and held that this Court has jurisdiction to hear and determine the claim against defendant No. 2.

For Plaintiff: Adv. P. H. Manners, instructed by Messrs. Morris Alexander & Hirsch.

Defendants in person.

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